

BEFORE THE HEARING OFFICER

EDMUND D. EDELMAN

In the Matter between	)	
	)	
ARTHUR BULLER	)	OPINION
	)	
and	)	ARTHUR BULLER SUSPENSION
	)	
FRESNO POLICE DEPARTMENT,	)	C.S.M.C.S. #ARB 02-0756
CITY OF FRESNO	)	CA File No. 1646.448
_____	)	

The Hearing Officer was mutually selected by the parties from a list provided by the California State Mediation and Conciliation Service.

BACKGROUND

Arthur Buller, a police officer with the Fresno Police Department, appeals from an order of suspension for 40 hours by the Department for statements he made to a reporter from the Fresno Bee Newspaper. The statements made by Buller and reported by the Fresno Bee on November 11, 2001 were critical of Mike White, the chief pilot of the Skywatch Helicopter Patrol Unit, and Mark Ferguson, the mechanic with the Skywatch Unit, for their conduct in the Unit.

The Fresno Police Department contends that statements made by Buller, wherein he mentioned by name Chief Pilot White and Mechanic Ferguson, violated two standing orders of the Fresno Police Department:

Standing Order 2.4.1 Supervisor/Subordinate Relations, 02.00 Respect for Members

“Members shall treat all other members with respect and shall be civil, courteous, and professional in their relationships with one another regardless of rank or assignment.”

Standing Order 2.4.1 Supervisor/Subordinate Relations, 04.00 Insubordination, reads,

“Willful failure or deliberate refusal of any member to obey any lawful order given by a superior member shall be deemed insubordination. Ridiculing a superior member or his or her orders whether in or out of his/her presences, is also considered insubordination. Insubordination is strictly prohibited and will subject the insubordinate member to disciplinary action.”

Buller was interviewed by the Fresno Bee reporter on June 15, 2001 for about 4 hours. However, the newspaper did not publish the story until November 11, 2001.

After the story was published, both White and Ferguson filed complaints with the Fresno Police Department against Buller for the statements that appeared in the article about them.

When questioned by the Department about the interview, Buller stated that he wanted to indicate that the problems at the Skywatch Unit were due to White and Ferguson, not Assistant Chief Dyer.

Officer Buller has been employed as a police officer with the Fresno Police Department for 35 years. He worked in the Skywatch Unit, as an observer and pilot from 1997 to 2001.

The interview of June 15, 2001 took place at Buller’s home while he was off duty. On June 18, 2001, Buller met with Dyer to tell him about the interview and was requested by Dyer to prepare a summary of the interview with the reporter which Buller subsequently did in his June 22, 2001 letter to Assistant Chief Dyer.

After an internal affairs investigation, Buller was notified that a 40 hour suspension would be imposed for the statements he made to the reporter of the Fresno Bee. It was from this proposed disciplinary action that Buller has appealed and the matter is now before the hearing officer.

Hearings were held on December 11, 2002 and December 18, 2002. The following witnesses testified: Deputy Chief Thomas Frost, Sergeant Clayton Smith, and Chief Pilot Mike White for the City of Fresno. The following witnesses appeared for the appellant: Officer Arthur Buller, Lawrence Hustedde, Kent Jura and Roger Rouse.

All witnesses were subject to cross-examination and documentary evidence was received into the record. After the conclusion of the hearing, briefs were filed by the parties.

#### QUESTION TO BE DECIDED

The Hearing Officer frames the issue as follows: Was the suspension of Officer Buller for 40 days for just cause? If not, what shall be the remedy?

#### CITY POSITION

The City contends that the statements made by Officer Buller to the reporter of the Fresno Bee were disrespectful, disparaging and critical of White and Ferguson in violation of the department's Standing Order 2.4.1 (Respect For Members) 02.00 and Standing Order 2.4.1 (Insubordination) 04.00.

The City specifically points to comments made by Buller in the letter of June 22, 2001 which he prepared for Assistant Chief Dyer and after he informed Chief Dyer of his interview with the Fresno Bee reporter. Specifically, the City points to the following statements in the June 22, 2001 letter: "Mike White is one who cannot do even an

acceptable job after 20 years of experience as a police pilot and observer” and “Mark Ferguson is a parrot for Mike White.” The City contends that the June 22<sup>nd</sup> letter to Assistant Chief Dyer is fraught with demeaning allegations against these two employees. The City contends that it is essential that there be good and courteous relationships between police personnel working together and that these statements impair those relationships. The City further contends that the effectiveness of the Department is impaired when a police officer publicly attacks his superior as this diminishes the authority and credibility of the superior officer to lead.

In essence, the City contends it had just cause to suspend Buller for 40 hours under its standing orders. Finally, the City argues that the free speech protection under the Chico case does not apply to Officer Buller’s statements because they were personal in nature and impaired the effectiveness of the Fresno Police Department.

#### APPELLANT POSITION

Buller contends that his statements to the Fresno Bee reporter recited in the November 11, 2001, article in the Fresno Bee involved matters of public concern, namely, safety and working conditions in the Skywatch unit and therefore are protected by the First Amendment to the U.S. Constitution. Appellant cites the case of Chico Police Officer’s Association, et al., and the City of Chico 232 Cal.App.3d 635; 283 Cal.Rptr. 610 (June, 1991). In that case, the discipline of police officers over their public statements which were critical of the Chico Police Chief and other senior officers could not stand because the statements related to matters of public concern and therefore were protected by the First Amendment to the U.S. Constitution. Appellant argues that while individual names of Ferguson and White were used by Buller it was related to their

conduct in the Skywatch Unit as chief pilot and as a mechanic. Appellant argues that once statements are determined to involve matters of public concern, not simply personal matters, the burden shifts under the Chico case to the Police Department to show that there has been an actual impairment or harm to the Department's operations and effectiveness. And in the instant matter the Appellant contends that City did not introduce any evidence at the hearing to show actual impairment or harm to the Department because of Buller's statements. In conclusion, Appellant contends that under the Chico case the Department's interest in discipline and efficiency did not outweigh officer's free speech interest and hence the 40-hour suspension was without just cause.

#### DISCUSSION

The first task of the Hearing Officer is to examine what Buller told the reporter on June 15, 2001 and later reported in the Fresno Bee newspaper on November 11, 2001 relating to Chief Pilot White and mechanic Ferguson.

The following statements were reported in the newspaper on November 11, 2001 and attributed to Buller: "...Michael White did not support a Skywatch pilot who believed visibility was too poor to fly but was intimidated when Dyer wanted the helicopter airborne." "...White falsified a student pilot's log giving the student more hours than he deserved." "The mechanic had changed the oil on the aircraft prior to the flight and apparently did not tighten down the bolt. All the oil drained out of the engine during flight." Buller wasn't completely candid when the authorities questioned him about the rough landing because "White was giving him the evil eye". White pulled out a transmission that was causing problems "before anybody could look at it". White was flying a night patrol and had to land in a parking lot at Fresno College. White told the

FAA investigators that a faulty fuel gauge was the cause, not a lack of fuel, but Hustedde the other officer riding with White looked at the gas tanks with a flashlight and could not see any fuel.

The 18-page letter that Buller prepared for Assistant Chief Dyer concerning what he told the reporter has additional statements that were not reported in the November 11, 2001 article in the Fresno Bee. These additional statements were as follows: “Mike White is one who cannot do even an acceptable job after 20 years of experience as a police pilot and observer.” “The real problem was that the chief pilot never came to our defense to tell Dyer the visibility was really too bad to fly in.” “I found Mike White to be overall a poor instructor, and I questioned many of his abilities as chief pilot.” “He frequently talked down to the observers. It was not unusual for him to raise his voice over simple matters.” “Mike got so heated I was afraid he was going to go after the officer physically.” “I strongly believe that Mike had not been truthful with Jerry Dyer, that he had hidden things from Dyer...” “Mike White mentioned to me at one point in his surreptitious little way...” “I would never go to Mike White on my own for flight training even if it was at a highly reduced rate.” “Mark Ferguson is a parrot for Mike White.”

These statements made by Buller in the letter to Chief Dyer on June 18, 2001 never appeared in the newspaper article of November 11, 2001 even though the newspaper reporter secured a copy of the letter and the letter was mentioned in general in the article of November 11, 2001. Buller denied making a copy available to the reporter and Buller stated that the reporter had promised not to identify Buller in the article, but

that he did so when he got a copy of the letter because his promise did not extend to any written statements from Buller.

The question becomes whether these statements made by Buller in the letter of June 22, 2001 but not reported in the newspaper article should be considered by the Hearing Officer or only those statements that appeared in the newspaper article of November 11, 2001. The Hearing Officer chooses to consider all statements made by Buller in reaching his decision.

The controlling case, as mentioned above, is Chico Police Officers Association, et al. and the City of Chico, 232 Cal.App. 3d 635; 283 Cal.Rptr. 610 (June 1991). That case held that a police officer's speech was protected by the First Amendment of the U.S. Constitution if the speech related to matters of public concern. In that case, the court held that in the absence of evidence of actual harm to the Police Department, the Department's interest in discipline and efficiency did not outweigh the officer's free speech rights. The key test to determine if speech is protected is whether the speech related to matters of public concern. That is, when an employee's expression can be considered to relate to matters of political, social or other concerns of the community. If the expression cannot be fairly considered as relating to any matters of political, social or other concerns of the community, but simply individual personnel grievances, governmental officials according to the Chico case have wide latitude in managing their offices.

Thus, the determination must be made as to whether the statements attributed to Buller in the article of November 11, 2001 relate only to individual personnel disputes and grievances or whether the statements contain information relating to matters of public concern that are relevant to the public evaluation of the performance of governmental

agencies. Several statements made by Buller in his letter of June 18, 2001 to Assistant Chief Dyer involved personal characteristics of White and Ferguson, e.g. “Mike White mentioned to me at one point in his surreptitious little way...” or “Mark Ferguson is a parrot for Mike White.” However, all of Buller’s statements must be looked at in their entirety. When this is done, it is evident that Buller’s criticism concerned the conduct of White and Ferguson in their duties as chief pilot and mechanic respectively in the Skywatch Unit. As such, they pertain to matters of public concern, i.e. the operation and maintenance of the Skywatch Unit, and therefore, are protected by the First Amendment to the U.S. Constitution. If one of the Skywatch helicopters were to crash due to pilot or mechanical negligence, significant loss of life and property could occur.

The next question to be determined is whether the Department made a showing of actual impairment or disruption to its operations from the public statements made by Buller. Under the Chico case, the Department could prevail even if a statement was a matter of public concern if the Department actually showed a disruption or impairment of the operations of the Department by virtue of the statements made. In this case, the Department referred to the possibility of personnel not working well together after the chief pilot and mechanic were criticized by Buller. However, the Department did not introduce any evidence to corroborate this assertion. The language of the Chico case is quite clear about the need to show actual harm. “...there was no evidence that...(the statement) interfered with the efficient functioning of the office.” (p. 650) The City failed to meet their burden of demonstrating actual harm to internal discipline and efficiency as a result of this speech. “...The City must demonstrate actual, material and substantial disruption .” (p. 654)



The Hearing Officer notes that Buller made an attempt to report the operation and maintenance problems he knew about involving Chief Pilot White and Mechanic Ferguson to his supervisor, Sergeant C. Smith. Sergeant Smith, according to Buller, did nothing to look into these allegations and in fact believed that Buller was simply unable to get along with Chief Pilot White and Mechanic Ferguson. Officer Buller said that he was marked down in his performance rating by Sergeant Smith for failing to get along with White and Ferguson. Therefore, Buller did not continue to complain to Sergeant Smith, his supervisor.

There is no question that it would have been most appropriate for Buller to have made his criticism of White and Ferguson through the internal mechanisms of the Police Department. Although this might have been the preferable way, he nevertheless is protected in his statements to the reporter by virtue of the fact that his statements involved matters of public concern and as such are protected by the First Amendment to the U.S. Constitution under the Chico case unless the Department produced evidence of actual harm to the Department.

#### FINDINGS OF FACT AND CONCLUSION OF LAW

The Hearing Officer finds that the statements made by Buller and reported in the Fresno Bee Newspaper on November 11, 2001 involved matters of public concern, namely, the operations and maintenance of the Skywatch Unit. As such, they are protected by the First Amendment to the U.S. Constitution unless the City proved those statements caused actual harm or disruption to the Fresno Police Department. The Department did not introduce such evidence at the hearing.

Therefore, the Hearing Officer finds that the Fresno Police Department did not have just cause to suspend Buller for 40 hours.

ORDER

The Fresno Police Department is ordered to remove the order of suspension and to make Buller whole for any loss of pay due any discipline to be imposed.

The Hearing Officer retains jurisdiction to resolve any issue relating to his order.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Edmund D. Edelman  
Hearing Officer